STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF DAVID GELLER, by Executor DIANE G. KRANZ, Plaintiff-Appellant, v ELLIS SEDDON TRUST, by Co-trustees STEPHEN S. SEDDON, SHELLY PAXSON, and DORIS J. KUNKLE, Defendants-Appellees.	UNPUBLISHED January 2, 2014 No. 312115 Van Buren Circuit Court LC No. 11-610547-CB

Before: SAWYER, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

In this action for dissolution of Ellis Seddon Enterprises, Inc. (ESE), under the Business Corporation Act (BCA), MCL 450.1823, based on shareholder deadlock, plaintiff Estate of David Geller, by Diane G. Kranz, executor, appeals as of right the trial court's grant of summary disposition under MCR 2.116(C)(10) in favor of defendant Ellis Seddon Trust (Trust), by co-trustees Stephen S. Seddon, Shelly Paxson, and Doris J. Kunkle. Plaintiff also appeals the trial court's denial of its motion to amend the complaint. Because we find that the trial court abused its discretion in denying plaintiff's motion to amend its complaint, we reverse and remand.

ESE is a closely held Michigan corporation engaged in the horticulture mail order business. On September 27, 1996, a New York corporation, "Romar Sales" (Romar), and the Trust entered into a shareholders' agreement with regard to ESE. The agreement provided that Romar and the Trust would each own 50 percent of ESE's voting and nonvoting stock. The shareholder agreement provided that Geller was "the primary shareholder of Romar" and that Geller caused Romar to "authorize the corporate action set forth in this agreement." Geller passed away on April 6, 2009, and Kranz was appointed executor of his estate. Kranz was Romar's sole director and decided to dissolve the Romar corporation after Geller's death. Kranz learned sometime later that Romar owned 50 percent of ESE's stock; however, she believed that the transfer of stock to the Geller estate was automatic upon Romar's dissolution and took no action to assign Romar's interest in ESE to Geller's estate. Kranz contacted the Trust to negotiate a possible buyout of Romar's interest in ESE. Despite some initial action, both parties agreed that, "[s]ince the death of David Geller . . . the Geller Estate and Seddon Trust have been

deadlocked with respect to the management of [ESE's] affairs and as to the desirability to continue the business venture together or to liquidate the entity."

Accordingly, on November 4, 2011, Kranz, as executor of Geller's estate, filed a complaint for dissolution of ESE because of shareholder deadlock pursuant to MCL 450.1823. Defendants moved for summary disposition, arguing that, because Geller's estate is not a shareholder of ESE, it did not have standing under MCL 450.1823, which only authorizes suit by "1 or more directors or by I or more shareholders entitled to vote in an election of directors of the corporation." Kranz filed a cross-motion for leave to amend the complaint and add Romar as a plaintiff pursuant to MCR 2.118(A) and 2.116(I)(5). The trial court issued an opinion and entered an order with regard to the motions on June 25, 2012, stating:

> After reviewing the arguments of counsel and the pleadings and documents submitted, the Court finds that Plaintiff is not a shareholder of [ESE], and therefore does not have standing to bring this dissolution action, nor have the authority to add Romar Sales as Plaintiff to this dissolution action. For the forgoing reasons, Defendant's Motion for Summary Disposition is Granted, and Plaintiffs Cross Motion to Amend the Complaint is DENIED.

The trial court also found that the shareholder agreement provided that Romar must obtain written permission from the Trust to transfer its ESE stock to Geller's estate.

First, we consider plaintiff's assertion that the trial court abused its discretion in denying its motion to amend the complaint. "We review denials of motions for leave to amend pleadings for an abuse of discretion." *Franchino v Franchino*, 263 Mich App 172, 189; 687 NW2d 620 (2004).

Plaintiff filed leave to amend under MCR 2.118(A), which provides in pertinent part that

> (2) Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires.

Plaintiff also moved to amend under MCR 2.116(I)(5), which states that, "[i]f the grounds asserted [for summary disposition] are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." See also *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). "Motions to amend should be denied only for specific reasons such as [1] undue delay, [2] bad faith or dilatory motive on the part of the movant, [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment, [and 5] futility . . . ." *Franchino*, 263 Mich App at 189-190.

Here, the trial court denied the motion to amend because it found that Kranz provided no authority or documentation that she "can act on the behalf [sic] of a dissolved corporation to become a party to this dissolution action," and that Kranz, as executor of Geller's estate, "is not a shareholder of [ESE], and therefore does not have standing to bring this dissolution action, nor

have [sic] the authority to add Romar Sales as Plaintiff [sic] to this dissolution action." Romar was incorporated in New York, and according to New York law,

> (a) A dissolved corporation, its directors, officers and shareholders may continue to function for the purpose of winding up the affairs of the corporation in the same manner as if the dissolution had not taken place . . . . In particular, and without limiting the generality of the foregoing:
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> * * *
>
> (4) The corporation may sue or be sued in all courts and participate in actions and proceedings . . . in its corporate name . . .. [NY Bus Corp Law § 1006]

Further, "the business of a corporation shall be managed under the direction of its board of directors." NY Bus Corp Law § 701.

Kranz was Romar's sole director. Accordingly, in her capacity as Romar's director, Kranz had authority to manage Romar's business, including winding up corporate affairs and participating in actions and proceedings under Romar's name. NY Bus Corp Law § 1006; NY Bus Corp Law § 701. Therefore, the trial court incorrectly concluded that Kranz did not have the authority to add Romar as a party to the action. Considering that leave to amend should be freely given and "ordinarily should be granted," absent "particularized reasons," *Titan Ins v N Pointe Ins*, 270 Mich App 339, 346; 715 NW2d 324 (2006), and that the trial court's reason for denying the motion does not have support in the law, we find that the trial court abused its discretion in denying plaintiff's motion to amend the complaint.

In light of our conclusion that plaintiff is entitled to amend, we need not reach defendant's remaining arguments with regard to whether summary disposition was properly granted based upon plaintiff's lack of standing. However, we find it necessary to address the secondary issue of whether Romar must obtain written permission from the Trust to transfer its ESE shares. Plaintiff argues that the trial court erroneously concluded that, pursuant to the shareholder agreement, Romar could not transfer its ESE stock to Geller's estate without first obtaining written permission from the Trust.

The primary goal of contract interpretation is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement. *Dobbelaere v Auto Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). "A contract is said to be ambiguous when its words may reasonably be understood in different ways." *Raska v Farm Bureau Mut Ins Co of Michigan*, 412 Mich 355, 362; 314 NW2d 440 (1982). "[C]ourts must also give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

The shareholder agreement provided the following with regard to the allocation of ESE's stock: (1) that "David Geller is the primary stockholder of Romar Sales, Inc., and has caused Romar Sales, Inc., to authorize the corporate action set forth in this agreement;" and (2) Ellis Seddon "has executed a trust document which is the title holder" of his ESE stock; and (3) that

an equal amount of voting and nonvoting shares were assigned to each party. Additionally, with regard to the restriction of the transfer of the stock, the shareholder agreement provided that

> [n]o shareholder shall at any time transfer or subject to any encumbrances any shares of the capital stock of the Corporation now or at any time hereafter owned by him unless he shall first have obtained the written consent to such transfer or encumbrance from the other Shareholder. *This restriction does not include a transfer occurring by way of an inheritance to a shareholder's family and/or estate.* [Emphasis added.]

Although the agreement does not define the term "shareholder," dictionary definitions include, "a person, company, etc., that owns shares of stock in a company or corporation." *Random House Webster's College Dictionary* (1997). Therefore, the term "shareholder" appears to apply to Romar and the Trust, i.e., the entities who hold legal title to ESE's shares. However, the agreement also provides that restriction on the transfer of stock "does not include a transfer occurring by way of an inheritance to a shareholder's family and/or estate." Corporations and trusts do not transfer title to assets by "way of inheritance." See *In re Butterfield Estate*, 418 Mich 241, 259; 341 NW2d 453 (1983) (Courts refer to the trust instruments to determine the powers and duties of the trustees and the intent of the settlors regarding the purpose and actions of a trust.). See also *In re Hicks*, 72 AD3d 1085 (NY App Div 2010); NY Bus Corp Law § 1006. Thus, "shareholder," as used in the clause concerning restrictions on the transfer of stock, cannot be referring to Romar and the Trust. Accordingly, the term "shareholder" may refer to Geller and Seddon, who caused their respective entities to enter into the shareholder agreement.

As mentioned *supra*, "courts must . . . give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp*, 468 Mich at 468. Here, if "shareholder" only referred to the Trust and Romar, it would render the language allowing for "transfer occurring by way of an inheritance to a shareholder's family and/or estate" surplusage. Moreover, "[t]he primary goal of contract interpretation is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement." *Dobbelaere*, 275 Mich App at 529. The fact that the portions of the shareholder agreement expressly provide that David Geller was Romar's primary stockholder and that Ellis Seddon created the Trust are indicative of the parties' intent, specifically, that both Geller and Seddon be able to transfer their ESE shares to their respective estates by way of inheritance. Accordingly, we find that the trial court erroneously concluded that Kranz, as Romar's sole director, could not transfer the ESE stock to Geller's estate without first obtaining written permission from the Trust.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Cynthia Diane Stephens